Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

No. 91-1030

In The

# Supreme Court of the United States

October Term, 1992

PAMELA WITHROW,

*Petitioner,*

vs.

ROBERT ALLEN WILLIAMS, JR.,

*Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the rule announced in *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to bar a federal court from entertaining a state prisoner's habeas corpus petition alleging that he is in custody under a conviction secured by the State's use, as evidence of guilt, of statements he made in response to custodial police interrogation without having received any of the procedural safeguards mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. Whether the State's express waiver of reliance on any exhaustion argument in the Sixth Circuit makes it inappropriate for this Court to consider that issue.

3. Whether the lower courts' reliance on settled principles governing voluntariness of confessions presents any issue under this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989).

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE ..... 1

The Interrogation ..... 1

State Court Proceedings ..... 4

District Court Proceedings ..... 6

Court of Appeals Proceedings ..... 8

SUMMARY OF ARGUMENT ..... 9

The *Miranda* Holding ..... 10

The Voluntariness Holding ..... 12

ARGUMENT ..... 14

I. The Rule in *Stone v. Powell* Should Not Be Applied to Bar Respondent's Claim That His Conviction Was Secured by the State's Use, as Evidence of Guilt, of Custodial Statements Made Without Any of the Safeguards Required by *Miranda v. Arizona* ..... 15

A. This Court Has Carefully Limited the Rule Announced in *Stone* to Claims Under the Fourth Amendment Exclusionary Rule ..... 15

B. None of the Considerations That Justified *Stone's* Limitation of the Remedy Encompassed by the Fourth Amendment Exclusionary Rule Warrants Barring *Miranda* Claims From Federal Habeas Corpus ..... 17

1. Unlike *Mapp*, *Miranda* Does Not Merely Deter Police Misconduct: It Actually Does " 'Redress the Injury' to the Person Affected" ..... 18



TABLE OF CONTENTS – Continued

Page

2. Unlike the Fourth Amendment Exclusionary Rule, *Miranda* Rights Are Fundamentally Linked to Considerations of Fairness and Reliability at Trial ..... 20

3. Eliminating *Miranda* Claims from Federal Habeas Corpus Will Neither Decrease the Burden on Federal Courts Nor Ameliorate Federal-State Friction ..... 23

C. That *Miranda* Announced "Prophylatic Rules" Necessary to Protect the Fifth Amendment Provides No Justification for Removing *Miranda* Claims From Federal Habeas Corpus ..... 26

1. *Miranda's* Prophylactic Rules Are Bound to Its Core Constitutional Holdings ..... 27

2. *Stone* Provides No Justification for Excluding Violations of Prophylactic Rules Like Those Announced in *Miranda* ..... 31

D. No Other Basis Exists to Decline Review of *Miranda* Claims Brought under 28 U.S.C. § 2254 ..... 35

II. There Is No Basis For Reversing the Sixth Circuit's Holding That Respondent Was Entitled To Habeas Corpus Relief Because Involuntary Statements Were Used at Trial As Evidence of Guilt ..... 36

A. Petitioner's Argument That All Fifth Amendment Claims (and, Indeed, All Constitutional Claims) Should Be Conditionally Excluded From Federal Habeas Corpus Is Not Properly Before the Court ..... 37

TABLE OF CONTENTS – Continued

Page

B. The State Expressly Waived the Argument That Robert Williams Failed To Exhaust His Voluntariness Claim..... 40

C. The Lower Courts' Ruling on Voluntariness Correctly Applied Settled Principles of Law and Is in No Way Contrary to *Teague v. Lane*.... 44

CONCLUSION..... 50



TABLE OF AUTHORITIES

Page

CASES:

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)..... 43

*Aguilar v. Texas*, 378 U.S. 108 (1964)..... 23

*Amadeo v. Zant*, 486 U.S. 214 (1988)..... 43

*Anderson v. Harless*, 459 U.S. 14 (1982)..... 41

*Arizona v. Fulminante*, 111 S. Ct. 1246 (1991)..... *passim*

*Avery v. Georgia*, 345 U.S. 559 (1953)..... 34

*Batson v. Kentucky*, 476 U.S. 79 (1986)..... 34

*Beecher v. Alabama*, 408 U.S. 234 (1979)..... 34

*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988)..... 44

*Berkemer v. McCarty*, 468 U.S. 420 (1984)..... 6, 17

*Blackledge v. Perry*, 417 U.S. 21 (1974)..... 34

*Boyd v. United States*, 116 U.S. 616 (1886)..... 18

*Brady v. United States*, 397 U.S. 742 (1970)..... 7, 46

*Bram v. United States*, 168 U.S. 532 (1897) 13, 45, 46, 48

*Brecht v. Abrahamson*, 60 U.S.L.W. 3849 (U.S., June 16, 1992)..... 14

*Brewer v. Williams*, 430 U.S. 387 (1977)..... 17, 21, 33

*Brown v. Allen*, 344 U.S. 443 (1953)..... 36, 38, 39

*Brown v. Illinois*, 422 U.S. 590 (1975)..... 49

TABLE OF AUTHORITIES – Continued

Page

*Brown v. Mississippi*, 297 U.S. 278 (1936)..... 27

*Bruton v. United States*, 391 U.S. 123 (1968)..... 34

*Butler v. McKellar*, 494 U.S. 407 (1990)..... 35

*California v. Prysock*, 453 U.S. 355 (1981)..... 25

*Cardwell v. Taylor*, 461 U.S. 571 (1983)..... 17

*Castaneda v. Partida*, 430 U.S. 482 (1977)..... 34

*Chambers v. Florida*, 309 U.S. 227 (1940)..... 22

*Coleman v. Thompson*, 111 S.Ct. 2546 (1991)..... 24, 31

*Commonwealth v. Meehan*, 377 Mass. 552, 387 N.E.2d 527 (1979), *cert. dismissed*, 445 U.S. 39 (1980)..... 48

*Commonwealth v. Saya*, 17 Mass. App. 921, 456 N.E.2d 764 (1983), *rev. denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1984)..... 45

*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)..... 43

*Cruz v. New York*, 481 U.S. 186 (1987)..... 34

*Culombe v. Connecticut*, 367 U.S. 568 (1961)...14, 37, 45

*Desist v. United States*, 394 U.S. 244 (1969)..... 35

*Drope v. Missouri*, 420 U.S. 162 (1975)..... 34

*Duckworth v. Eagan*, 492 U.S. 195 (1989)..... *passim*



TABLE OF AUTHORITIES – Continued

Page

*Duignan v. United States*, 274 U.S. 195 (1927)..... 43

*Duncan v. Louisiana*, 391 U.S. 145 (1968)..... 33

*Escobedo v. Illinois*, 378 U.S. 478 (1964)..... 21

*Fikes v. Alabama*, 352 U.S. 191 (1957)..... 32

*Granberry v. Greer*, 481 U.S. 129 (1987)..... 13, 44

*Green v. Scully*, 850 F.2d 894 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988)..... 47

*Haley v. Ohio*, 332 U.S. 596 (1948)..... 25

*Hawkins v. Lynaugh*, 844 F.2d 1132 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988)..... 47

*Hayes v. Florida*, 470 U.S. 811 (1985)..... 50

*Haynes v. Washington*, 373 U.S. 503 (1963)..... 26

*Hoover v. Ronwin*, 466 U.S. 558 (1984)..... 44

*Irvine v. California*, 347 U.S. 128 (1954)..... 40

*Jackson v. Virginia*, 443 U.S. 307 (1979)..... 17, 49

*Johnson v. New Jersey*, 384 U.S. 719 (1966)..... 21

*Jones v. Hildebrant*, 432 U.S. 183 (1977)..... 40

*Kastigar v. United States*, 406 U.S. 441 (1972)..... 19

*Kaufman v. United States*, 394 U.S. 217 (1969)..... 20

*Keeney v. Tamayo-Reyes*, 60 U.S.L.W. 4339 (U.S., May 4, 1992)..... 24

*Kimmelman v. Morrison*, 477 U.S. 365 (1986)...17, 18, 23

*Linkletter v. Walker*, 381 U.S. 618 (1965)..... 16, 18

TABLE OF AUTHORITIES – Continued

Page

*Lynumn v. Illinois*, 372 U.S. 528 (1963) ..... 47

*Mapp v. Ohio*, 367 U.S. 643 (1961) ..... *passim*

*Massachusetts v. Sheppard*, 468 U.S. 981 (1984) ..... 50

*McCleskey v. Zant*, 111 S. Ct. 1454 (1991) ..... 24, 36

*Michigan v. Mosley*, 423 U.S. 96 (1975) ..... 28

*Michigan v. Tucker*, 417 U.S. 433 (1974) ..... *passim*

*Miller v. Fenton*, 474 U.S. 104 (1985) ..... *passim*

*Miller v. Fenton*, 796 F.2d 598 (3d Cir.) *cert. denied*, 479 U.S. 989 (1986) ..... 47

*Minnick v. Mississippi*, 111 S. Ct. 486 (1990) ..... 25

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... *passim*

*Moran v. Burbine*, 475 U.S. 412 (1986) ..... 17, 30

*Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) ..... 19

*New Jersey v. Portash*, 440 U.S. 450 (1979) ..... 48

*New York v. Quarles*, 467 U.S. 649 (1984) ..... 21, 26, 29

*North Carolina v. Pearce*, 395 U.S. 711 (1969) ..... 34

*Oregon v. Elstad*, 470 U.S. 298 (1985) ..... *passim*

*Oregon v. Hass*, 420 U.S. 714 (1975) ..... 21

*Orozco v. Texas*, 394 U.S. 324 (1969) ..... 29

*Pate v. Robinson*, 383 U.S. 375 (1966) ..... 34

*Penry v. Lynaugh*, 492 U.S. 302 (1989) ..... 35

*People v. DeJesus*, 63 App. Div. 2d 148, 407 N.Y.S.2d 5 (1st Dep't 1978), *appeal dismissed*, 48 N.Y.2d 734, 422 N.Y.S.2d 379 (1979) ..... 48



TABLE OF AUTHORITIES – Continued

Page

*People v. Kyczek*, 307 Ill. 150, 138 N.E. 275 (1923) ..... 48

*People v. Pinkham*, 139 Ill. App. 3d 554, 487 N.E.2d 707 (1985) ..... 45

*Picard v. Connor*, 404 U.S. 270 (1971) ..... 41

*Reck v. Pate*, 367 U.S. 433 (1961) ..... 26

*Riggins v. Nevada*, 112 S. Ct. 1810 (1992) ..... 34

*Rochin v. California*, 342 U.S. 165 (1952) ..... 24

*Rose v. Mitchell*, 443 U.S. 545 (1979) ..... 16, 17, 23

*Ex parte Royall*, 117 U.S. 241 (1886) ..... 36

*Saffle v. Parks*, 494 U.S. 484 (1990) ..... 35

*Santobello v. New York*, 404 U.S. 257 (1971) ..... 48

*Sawyer v. Smith*, 497 U.S. 227 (1990) ..... 45

*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) ..... *passim*

*Sims v. Georgia*, 389 U.S. 404 (1967) ..... 32, 34

*Solem v. Stumes*, 465 U.S. 638 (1984) ..... 34

*Spano v. New York*, 360 U.S. 315 (1959) ..... 26

*Spinelli v. United States*, 393 U.S. 410 (1969) ..... 23

*State v. Burr*, 126 Ariz. 338, 615 P.2d 635 (1980) ..... 48

*State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986) ..... 46, 47

*Stein v. New York*, 346 U.S. 156 (1953) ..... 32

*Stone v. Powell*, 428 U.S. 465 (1976) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

*Stringer v. Black*, 112 S. Ct. 1130 (1992) ..... 49

*Taylor v. Cardwell*, 579 F.2d 1380 (9th Cir. 1978)..... 25

*Teague v. Lane*, 489 U.S. 288 (1989)..... *passim*

*Turner v. State*, 203 Ga. 770, 48 S.E.2d 522 (1948) .... 48

*United States v. Calandra*, 414 U.S. 338 (1974)..... 16

*United States v. Garot*, 801 F.2d 1241 (10th Cir. 1986) .... 48

*United States v. Guerrero*, 847 F.2d 1363 (9th Cir. 1988)..... 46

*United States v. Long*, 852 F.2d 975 (7th Cir. 1988) 46, 47

*United States v. Mast*, 735 F.2d 745 (2d Cir. 1984)..... 45

*United States v. Pelton*, 835 F.2d 1067 (4th Cir.), *cert. denied*, 486 U.S. 1010 (1988) ..... 47

*United States v. Pinto*, 671 F. Supp. 41 (D. Me. 1987) .... 48

*United States v. Shears*, 762 F.2d 397 (4th Cir. 1985) .... 47

*Wainwright v. Sykes*, 433 U.S. 72 (1977) ..... 36

*White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982), *vacated on other grounds*, 465 U.S. 1075 (1984). 20, 21

*Williams v. Michigan*, 493 U.S. 956 (1989) ..... 6

*Williams v. Withrow*, 944 F.2d 284 (6th Cir. 1991), *cert. granted*, 112 S. Ct. 1664 (1992)..... 9

*In re Winship*, 397 U.S. 358 (1970)..... 17

*Womack v. State*, 281 Ala. 499, 205 So. 2d 579 (1967) .... 48



TABLE OF AUTHORITIES – Continued

Page

*Woods v. Armontrout*, 787 F.2d 310 (8th Cir.), *cert. denied*, 479 U.S. 1036 (1987) ..... 47

*Wright v. West*, 60 U.S.L.W. 4639 (U.S., June 19, 1992)..... *passim*

*Wyrick v. Fields*, 459 U.S. 42 (1982)..... 17

*Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) ..... 39

STATUTES AND REGULATIONS:

28 U.S.C.

§ 2241(b) ..... 15

§ 2241(b)(3) ..... 35

§ 2254..... 17, 35

§ 2254(a) ..... 15, 16, 33, 35, 36

§ 2254(d) ..... 6

RULES:

Fed. R. Civ. P. 15(b)..... 42

Supreme Court Rule 14.1(a)..... 12, 39

24.1(a)..... 39

OTHER AUTHORITIES:

Y. Kamisar, *Police Interrogation and Confessions* (1980)..... 22

Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964) ..... 32

TABLE OF AUTHORITIES – Continued

Page

Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 N.W.U. L. Rev. 100 (1985) ..... 25

Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law,* 89 Harv. L. Rev. 1 (1975) ..... 26, 29, 31

Schulhofer, *Confessions and the Court,* 79 Mich. L. Rev. 865 (1981) ..... 22, 26

Schulhofer, *Reconsidering Miranda,* 54 U. Chi. L. Rev. 435 (1987) ..... 31

Note, *Developments in the Law – Confessions,* 79 Harv. L. Rev. 935 (1966) ..... 22, 26

## STATEMENT OF THE CASE

### The Interrogation

On April 6, 1985, police officers in Romulus, Michigan, discovered two men shot to death in a parked car. After obtaining information that Robert Williams may have been involved in the shootings, two officers visited his home on the morning of April 10th. They were admitted by Mr. Williams' mother, who told them her son was asleep. The officers requested that Mr. Williams be awakened and brought downstairs. They then informed him that they wanted to question him at the station. Mr. Williams was searched, placed in the police car, and brought to the stationhouse for questioning (C.A. App. 226a, 234a-35a, 238a-39a).[1] Although the officers later testified that Williams was not under arrest when brought to the police station, the official form they filled out at the time states that he was arrested at his residence (C.A. App. 235a-36a).

At the police station, interrogation commenced immediately. The officers began by informing Mr. Williams, who was alone, that he had "big problems," that substantial evidence implicating him in the murders had already been gathered, and that "[t]here's gonna be two life sentences here."[2]

---

[1] "C.A. App." refers to the Joint Appendix filed in the court below.

[2] The verbatim statements made by the police at the outset of the interrogation were as follows (C.A. App. 38a-39a):

| | |
|---|---|
| Sgt. Early: | For starters, you've got big problems. |
| Williams: | I do, huh. |
| Sgt. Early: | Big problems. You got people that are gonna testify that put you with this gun. That are gonna testify that you had it, when you had it, where you had it. |
| Off. Ondejko: | There's gonna be two life sentences here. This ain't no game. |
| Sgt. Early: | We're about that far right now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there, and we think we can prove it. |

Notwithstanding these statements, which the District Court found were delivered in a "serious and accusatory" tone (Pet. App. 47a), no *Miranda* warnings were given. When Williams denied having been at the scene of the crime, the officers continued questioning him about the offense and his whereabouts, assuring him that

> the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're gonna be pretty well content. (Pet. App. 47a).

During the interrogation, the officers specifically considered whether to advise Mr. Williams of his *Miranda* rights and decided not to. The tape recording of the interrogation session reveals that one officer asked the other in a low voice, "Did you read him his rights?", and his partner responded in a hushed lower voice, "Not yet." At no time did the police suggest that Williams was free to leave if he wished. In fact, shortly after concluding not to advise Williams of his rights, the interrogators made the following statement (Pet. App. 47a-48a) (emphasis added):

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is *you can talk about it now* and give us the truth and we're gonna check it out and see if it fits, *or else we're simply gonna charge you and lock you up* and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around this too fuckin' long.

Even after being told that if he did not answer his interrogators' questions he would be formally charged and locked up, Mr. Williams was *still* not advised of his constitutional rights. He then admitted he had provided the murder weapon and told police where the gun and certain items of clothing connected with the murders could be found. The police officers continued to suggest that they were interested only in finding the shooter, but they accused Williams of holding something back and lying himself into a corner. Only then, after forty minutes of questioning in which, as Sergeant



Early, the detective who conducted the principal interrogation, testified, Williams "began to implicate himself" (J.A. 13a), was Williams advised of his *Miranda* rights.

Following these warnings, interrogation continued at length, beginning with the following (Pet. App. 60a-62a):

| | |
|---|---|
| Sgt. Early: | You're being charged with murder in the first. |
| Williams: | Why? |
| Off. Ondejko: | Because you won't level with us. |
| Sgt. Early: | Do you understand your rights? |
| Williams: | Yeah. [nearly inaudible after a long pause]. |
| Sgt. Early: | Do you wish to make any further statements at this time? |
| Off. Ondejko: | Do you wish to change your story? [softly] |
| Williams: | What difference is it going to make? |
| Off. Ondejko: | It's gonna make a lot of difference to you. |
| Sgt. Early: | I told you. If you told the truth – |
| Williams: | [interrupting Early] I've been telling you the truth. |
| Sgt. Early: | Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to believe, and part of what really happened [angrily]. |
| Williams: | If I tell you everything that happened, I'm gonna walk outta here, huh? |
| Off. Ondejko: | Someday you may stand a chance of walking. |
| Sgt. Early: | I'll make you a deal. You tell us everything that happened and you |

> tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Sergeant Early repeated that "[t]omorrow you can walk out of here if you're telling me the truth" (Pet. App. 62a). Williams then made several further admissions. Although he had previously denied having been at the scene of the crime, he now admitted he had followed the two slain men and Mark Sennett, the individual he identified as the shooter, to the scene. He admitted he had heard and seen the shootings, driven the getaway car, and disposed of the murder weapon and Sennett's clothing. He denied having known that Sennett was going to kill the victims. (Pet. App. 5a-6a).

Custodial interrogation of Robert Williams continued on April 11th and 12th. Late in the day on April 12th, he was formally charged with murder and arraigned.

## State Court Proceedings

Prior to trial, Williams moved to suppress all of the statements he had made under police interrogation on the grounds, *inter alia*, that the statements "were involuntary in nature and were taken in violation of Defendant's rights under the 4th, 5th, and 6th Amend. of the Constitution" (J.A. 7a). His counsel argued not only that his pre-*Miranda* statements were inadmissible under the U.S. and Michigan constitutions, but also that his subsequent custodial statements were involuntary because of the repeated and misleading promises of leniency by the police (J.A. 37a, 57a). At the suppression hearing, the prosecutor admitted that "[i]t could have been that the police officers may have made a mistake in not advising him of his rights prior to" the time he was finally warned. He argued, however, that Williams' post-*Miranda* statements were not involuntary (J.A. 42a).

The trial court suppressed the statements made on April 11th and 12th under Michigan law because they were the product of an "unnecessary delay" in arraigning the defendant that "was for the purpose of extracting inculpatory statements" (Pet. App. 90a-91a). The court declined to suppress



any of the statements made by Williams on April 10th. Concluding that Williams had not been in custody before he was given *Miranda* warnings, the trial judge found no constitutional violation in the admission of the unwarned statements. The court did not specifically address Williams' argument that his post-warning statements were involuntary: it simply ruled that his waiver of *Miranda* rights rendered his subsequent statements admissible (Pet. App. 90a).

The statements made by Mr. Williams during his April 10th interrogation figured prominently at his bench trial. The prosecutor's opening statement highlighted the fact that after "suspicion focused on Mr. Robert Williams, who was then taken downtown, so to speak," Williams had "admitted to being present at the time of the shooting but simply sa[id] I was the driver" (Trial Tr. Vol. I, at 7-8). Sergeant Early testified about Williams' admissions on April 10th, and the tape of his pre-*Miranda* interrogation was played at the trial (J.A. 67a-86a). In closing, the prosecution argued that Mr. Williams' statements were critical evidence to establish the salient facts – that he was present at the scene, provided and disposed of the murder weapon, and drove the getaway car. The prosecutor also argued that Williams' statements and conduct during the interrogation provided evidence of his "mind set" (C.A. App. 284a; *see also id.*, at 286a-87a).

In rendering its verdict of guilty, the trial court adopted this view. Stating that the "crux of the case" was the "mental attitude and knowledge of this defendant" (*id.*, at 308a), the court repeatedly referenced both the admissions and the inconsistencies in Williams' April 10th statements, which the Court held (*id.*, at 310a),

> taxes its credulity to believe that this defendant was not knowledgeable and aware of what was going on. Originally he said he wasn't even there and subsequently changed his mind to the fact that yes, he was there but didn't know what was happening.

The court sentenced Williams to two consecutive life terms.

On appeal, the Michigan Court of Appeals affirmed the trial court's refusal to suppress the April 10th statements (C.A. App. 121a). The Michigan Supreme Court denied leave

to appeal (C.A. App. 197a). Williams' *pro se* petition for a writ of certiorari to this Court (*id.*, at 198a) was denied in November 1989. *Williams v. Michigan*, 493 U.S. 956 (1989).

**District Court Proceedings**

In January 1990, Mr. Williams filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The petition alleged as its principal ground for relief "Violation of MIRANDA RIGHTS" (C.A. App. 9a). Warden Withrow answered only that "Police need not give *Miranda*-warnings to persons who are not in police custody" (C.A. App. 16a). She did not suggest any bar to consideration of the issue on its merits. Following a full examination of the state-court record, which included a review of the tape recordings of all of Williams' interrogations,[3] the District Court ordered the writ to issue.

The District Court accorded all state-court findings of fact the presumption of correctness required by 28 U.S.C. § 2254(d) (Pet. App. 43a). The court correctly recognized "that the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination" (*id.*). Applying *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Berkemer v. McCarty*, 468 U.S. 420 (1984), to the state-court fact findings and the tape of the pre-warning interrogation session, the court found that, while Mr. Williams "may have been in custody" even at the time he was brought to the police station, in any event, given

[3] Pet. App. 41a. The record contains three audiotapes of Mr. Williams' statements on April 10, 1985. The first, labelled "Office" and marked No. 25 on the District Court docket sheet, records the interrogation which commenced immediately upon Mr. Williams' arrival in the police station. The second tape, labelled "Rights in Office" and marked No. 23, continues the interrogation (although there is an obvious gap between the first two tapes) and also includes the *Miranda* warnings and further interrogation following the warnings. The final tape from April 10th is labelled "Video" and marked No. 24. Notwithstanding the label of this third audiotape, no videotape exists of this or any other portion of the interrogation on April 10th. The record does contain a videotape of an interrogation conducted on April 12th, but that interrogation is not at issue, because all statements from April 12th were suppressed by the trial court.



the circumstances of the interrogation, he "was definitely in custody," and therefore entitled to *Miranda* warnings, by the time he was told "that he had a choice between answering his interrogators' questions and being formally charged and locked up" (Pet. App. 49a-50a):

> This choice did not leave petitioner free to go. It gave him a choice of surrendering his right to remain silent or being formally arrested. This was a significant deprivation of his freedom of action. A reasonable person in this position would have believed he was in custody at the time.

Finding that Williams made "several damaging admissions in response to unwarned, custodial police interrogation" between this time and the time *Miranda* warnings were finally given, the court held that Williams' Fifth Amendment rights had been violated by the introduction of these unwarned statements against him at trial (Pet. App. 49a-52a).

Next, because the prosecution had introduced in its case-in-chief evidence from *all* of the interrogation sessions conducted on April 10, 1985 – both before and after the *Miranda* warnings – the District Court was required to consider "whether petitioner's first, unwarned admissions tainted his subsequent, warned admissions" (Pet. App. 53a). Recognizing that " 'the ultimate issue of "voluntariness" is a legal question requiring independent federal determination' " (Pet. App. 54a-55a (*quoting Miller v. Fenton*, 474 U.S. 104, 110 (1985)), the court examined the circumstances relating to the subsequent statements under the framework set down in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Brady v. United States*, 397 U.S. 742 (1970). The court concluded that under the totality of the circumstances, Williams' post-*Miranda* statements made on April 10th could not be considered voluntary within the meaning of the Fourteenth Amendment. In the court's view, a principal factor favoring this conclusion was the fact that the interrogating officers repeatedly promised lenient treatment if Williams continued to talk. Thus, with respect to the second and third interrogation sessions on April 10th (*i.e.*, the two sessions following delivery of *Miranda* warnings), the District Court held (Pet. App. 70a-71a):

> In the present case, the police went far beyond mere exhortations to tell the truth. . . . Rather, after indicating several times that they were basically interested in knowing who the shooter was, the police promised petitioner that if he told them the truth about the crime he would not be charged. They made this promise to petitioner after acknowledging that they had witnesses who linked him to the murder weapon and stating that they believed they could prove he was at the murder scene. It was indeed, "quite unlikely" that petitioner would "walk" and not be charged at this time. Furthermore, this promise was made after having obtained unwarned admissions, thereby "exploit[ing] the unwarned admission to pressure [petitioner] into waiving his right to remain silent." *Elstad, supra*, at 316.

The court further held that, even if "harmless error analysis did apply to the admission of petitioner's inculpatory statements," it "could not find that admission of those statements was harmless" (Pet. App. 76a-77a).

### Court of Appeals Proceedings

In her brief on appeal, Warden Withrow argued, first, that the District Court should not have considered any constitutional claim because Mr. Williams had "never raised any Federal issue at all relating to his confession in the State appellate courts" (App. Br. 5-6) – a point the warden had never made in the District Court and which her counsel later expressly abandoned at oral argument.[4] On the merits, the warden urged that no constitutional violation had occurred because: (a) Mr. Williams had not been in custody prior to having received *Miranda* warnings; and (b) his post-warnings statements were not motivated by promises of leniency and therefore were voluntary under *Oregon v. Elstad, supra*. The warden also argued that the District Court's ruling on

[4] See pp. 41-43 *infra*. An audio recording of the Sixth Circuit oral argument has been lodged with the Clerk of this Court.



voluntariness was unnecessary because no post-warning statements had been admitted at the trial. On this latter point, the warden simply misstated the facts: as both lower courts recognized, the State had made liberal use at trial of Mr. Williams' post-*Miranda* statements of April 10th. *See, e.g.*, J.A. 66a-73a; Trial Tr. Vol. II, at 38, 40-41.[5]

Warden Withrow expressed "trust" in the Court of Appeals' "superior scholarship" to correct the "colossal error" committed by the district judge (Br. App. 13-14, 9). The Sixth Circuit, however, unanimously affirmed the District Court's rulings. It held that the District Court had "correctly decided" that Robert Williams had been subjected to custodial interrogation before being read his *Miranda* rights, and it agreed that "an evaluation of 'the entire course of police conduct' " established that Williams' subsequent statements made in interrogation on April 10th were not voluntary because "[t]he officers' promises of leniency were intended to induce Williams' admissions" and his admissions "were conditioned on his belief that he would be released if he talked." *Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991) (*quoting Oregon v. Elstad, supra*). The Court of Appeals recognized – notwithstanding confusion in the parties' arguments – that postwarnings statements of Mr. Williams *had* been used against him at trial, and in a fashion that could not be considered "harmless."

## SUMMARY OF ARGUMENT

The District Court and a unanimous panel of the Sixth Circuit held that Robert Williams is entitled to habeas corpus

[5] The State's use at trial of Williams' post-warning custodial statements is recognized in the brief *amicus curiae* of the United States (U.S. Br. 4 n.3) and now appears to be acknowledged in the brief for the petitioner.

In the Court of Appeals (but *not* in the District Court), the State argued that the rule in *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to *Miranda* claims. The state conceded that it "perceive[d] no legitimate basis for applying the rule in *Stone v. Powell* to cases involving the voluntariness of a confession" (App. Br. 15).

relief for two separate reasons: (1) custodial statements elicited by the police without administering any *Miranda* warnings were used against him as evidence of guilt at trial; and (2) subsequent custodial statements elicited from Mr. Williams by means which rendered them "involuntary" under the "totality of the circumstances" were also introduced as evidence of guilt at trial. Mr. Williams must be given a new trial unless both of those holdings are reversed.

## The *Miranda* Holding

Warden Withrow does not contest in this Court the ruling by all four federal judges below that, under *Miranda v. Arizona*, 384 U.S. 436 (1966), Robert Williams is entitled to a new trial. Her sole argument with respect to *Miranda* is that under the principles announced in *Stone v. Powell*, 428 U.S. 465 (1976), this Court should bar federal courts from enforcing *Miranda* on habeas corpus if a state court has provided a "full and fair" hearing on the *Miranda* claim.

This Court has repeatedly rejected arguments that *Stone* should be extended beyond its Fourth Amendment origins, emphasizing that *Stone* was concerned solely with the proper scope of the deterrence-based remedy announced in *Mapp v. Ohio*, 367 U.S. 643 (1961). Until now, Justice Brennan's expressed fear that *Stone* would lead to erosion of the scope of federal habeas corpus has truly been the "misdirected" "hyperbole" that the *Stone* Court said it was. *See Stone*, 428 U.S., at 494 n.37.

None of the justifications perceived in *Stone* for barring Fourth Amendment exclusionary rule claims from habeas corpus applies to claims under *Miranda*. Unlike the rule announced in *Mapp*, the exclusionary aspect of *Miranda* actually *prevents* a constitutional violation from occurring. When police seize evidence in violation of the Fourth Amendment, the constitutional infraction is complete, and excluding the evidence at trial neither prevents, erases, nor exacerbates it; rather, the exclusion is merely intended to deter the police from committing *future* violations. In contrast, when the police compel custodial statements from suspects or elicit



such statements from them without a knowing and voluntary waiver of their rights, the privilege against compelled self-incrimination is not infringed unless and until those statements are introduced as proof of guilt at trial. That is why it can properly be said that the Fifth Amendment Self-Incrimination Clause – unlike the Fourth Amendment – itself contains an exclusionary rule.

Also unlike *Mapp*, the dictates of *Miranda promote* rather than undermine the truthfinding function and fairness of trials because the evidence excluded by *Miranda* cannot be presumed reliable. The *Stone* Court was concerned that applying the Fourth Amendment exclusionary rule "deflects the truthfinding process" and "afford[s]" a "windfall [to] guilty defendant[s]," because the evidence "can in no way have been rendered untrustworthy by means of its seizure." 428 U.S., at 490 (citation omitted). The calculus is completely reversed under *Miranda*, where only presumptively compelled, and thus potentially unreliable, evidence is excluded.

Extending *Stone* to *Miranda* claims also promises none of the practical benefits occasioned by *Stone*. *Stone* succeeded in removing virtually all Fourth Amendment claims from the purview of federal habeas corpus. But even if *Miranda* claims were barred from habeas, prisoners would continue to raise the same constitutional claims with respect to their custodial statements, without expressly invoking *Miranda*, by arguing that the statements were compelled or involuntary and thus their use directly violated the Fifth and Fourteenth Amendments. Adjudicating those claims will actually *increase* the burden on the federal courts and friction with state courts, since those claims require the court to examine the "totality of the circumstances" surrounding the statement. And the courts will still have to adjudicate *Miranda* issues, since the administration *vel non* of *Miranda* warnings is an important factor in the "totality of the circumstances" test.

Finally, the *ipso facto* assertion that the *Stone* doctrine should extend to *Miranda* claims because *Miranda* supposedly announced only "prophylactic rules" fails for several reasons. For one thing, *Stone* did not concern prophylactic rules at all, because *Mapp* announced only a doctrine of

general deterrence, not prophylaxis designed to prevent the defendant's constitutional right from being violated. Moreover, *Miranda* cannot be dismissed as "mere" prophylaxis, for that landmark case contained core constitutional holdings, and the prophylactic rules it also announced are fundamental to the guarantee of those rights. A new doctrine extending *Stone* to prophylactic rules needed to enforce constitutional rights would require re-examination of much of federal constitutional doctrine, with an anomalous result: separate bodies of federal constitutional doctrine, one for application by state courts and another for application by federal habeas corpus courts. Among other unwelcome consequences, this would subvert the recognized function of federal habeas corpus to ensure that state courts faithfully follow extant federal constitutional rules.

**The Voluntariness Holding**

There is no occasion for this Court even to review the merits of the lower courts' voluntariness holding, for all of the warden's arguments attacking that ruling have either been waived or manufactured by misrepresenting the record. The warden's brief argues, for example, that all Fifth Amendment claims, and indeed all constitutional claims, should be excluded from consideration on habeas corpus if there was a full and fair opportunity to litigate them in state court. *See* Pet. Br. 97-98 n.67. This extravagant argument is barred from consideration by Supreme Court Rule 14.1(a) because it was not raised in the Petition for Certiorari, which sought review only on the question of whether federal courts should hear *Miranda* claims on habeas corpus. Moreover, in the court below the warden argued precisely the *opposite* position – stating that she could "perceive[] no legitimate basis" for extending *Stone v. Powell* to voluntariness claims. App. Br. 15.

The warden's next argument – that Mr. Williams failed to exhaust his voluntariness claim – was expressly waived by her counsel in the Sixth Circuit. In the District Court, the warden suggested *no* procedural bars to considering the merits of Mr. Williams' *pro se* habeas petition. In her brief to



the Sixth Circuit, she reversed course and claimed that Mr. Williams had never raised *any* federal claim in the state courts. When questioned about "the exhaustion issue" at oral argument, counsel again reversed ground, inviting the court "to overlook that" because "I think I did not really raise that sufficiently in the District Court" and "I don't feel comfortable arguing that too forcefully." The Sixth Circuit relied on counsel's representations and affirmed the District Court on the merits. Only then did the State suggest a distinction between *Miranda* and the voluntariness issue, contending that only the former had been fully exhausted. That argument is merely a belated attempt to wriggle out of an unsuccessful strategic gamble. Allowing the warden to "unwaive" at this point would constitute blatant sandbagging of the Sixth Circuit, permitting the State improperly "to seek a favorable ruling on the merits in the [lower] court while holding the exhaustion defense in reserve for use on appeal." *Granberry v. Greer*, 481 U.S. 129, 132 (1987).

The warden's final attack on the voluntariness holdings below – that they constitute a "new rule" in violation of *Teague v. Lane*, 489 U.S. 288 (1989) – is plainly refuted by the careful opinions of both the District Court and the Sixth Circuit. The warden claims that both lower courts ruled that the statements elicited from Mr. Williams were *per se* involuntary under *Bram v. United States*, 168 U.S. 532 (1897), because they were induced by police promises of leniency. But this was not the ruling of either court. In fact, both courts pointedly rejected application of a *per se* rule and instead expressly applied the "totality of the circumstances" test outlined in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Miller v. Fenton*, 474 U.S. 104 (1985) – properly considering the repeated police promises and threats to be relevant factors within those "surrounding circumstances." The question posed in the Petition for Certiorari – whether a *per se* rule would violate *Teague* – is simply not presented by this case.

## ARGUMENT

Both the District Court and the Sixth Circuit found two independent bases for granting the writ of habeas corpus to Robert Williams: the use against him at trial of (a) statements elicited in violation of *Miranda v. Arizona* and (b) post-warnings statements that were involuntary and hence inadmissible under the rationale of *Oregon v. Elstad*, 470 U.S. 298 (1985), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The courts below held that neither error could be excused as harmless under *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), and the warden has not challenged the lower courts' conclusions regarding harmless error either in her petition for certiorari or in her brief.[6] Thus, the judgment of the Sixth Circuit must be sustained unless the warden demonstrates legal grounds for rejecting the Court of Appeals' affirmance of *both* the District Court's ruling on *Miranda* and its holding that Williams' post-warning statements were involuntary.

As did the courts below, we address first the *Miranda* issue. It bears mention at the outset, however, that as to the voluntariness issue, which provides an independent ground for affirmance, *none* of the arguments the warden advances for reversal is properly presented. *See* pp. 12-13 *supra*. Indeed, the warden's treatment in her brief of the very questions she presented to the Court with respect to the voluntariness rulings below – discussing each only in a footnote – demonstrates their lack of substance and suggests that an appropriate disposition of this case may be dismissal of the writ.

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[6] In any event, because Williams' custodial statements provided the centerpiece of the prosecution's case, and because the trial judge expressly stated that they were critical to his verdict, the error in this case could not possibly be deemed "harmless" under any standard. *Cf. Brecht v. Abrahamson*, 60 U.S.L.W. 3849 (U.S., June 16, 1992) (granting certiorari to 944 F.2d 1363 (7th Cir. 1991)).



### I. The Rule in *Stone v. Powell* Should Not Be Applied to Bar Respondent's Claim That His Conviction Was Secured by the State's Use, As Evidence of Guilt, of Custodial Statements Made Without Any of the Safeguards Required by *Miranda v. Arizona*.

The warden and her *amici* urge this Court to extend the rule announced in *Stone v. Powell* to bar consideration of Robert Williams' claim that his conviction was obtained by the use of custodial statements elicited from him by the police without administering any of the warnings, or other "adequate protective devices," required by *Miranda v. Arizona*. The argument for this unprecedented extension of *Stone* is that "like the Fourth Amendment's exclusionary rule, *Miranda* is a prophylactic rule that overprotects the Fifth Amendment interests it is designed to serve," and "as the concerns underlying Fourth Amendment claims on habeas are identical to those involving *Miranda* defects, a habeas court's treatment of the two claims should be the same" (Pet. Br. 91). Neither of those statements is true. There is no principled basis for applying *Stone v. Powell* to this case.

#### A. This Court Has Carefully Limited the Rule Announced in *Stone* to Claims Under the Fourth Amendment Exclusionary Rule.

In *Stone v. Powell*, this Court held that federal courts should not entertain a claim made by a state prisoner in a petition for a writ of habeas corpus that his conviction was based upon evidence obtained in violation of the Fourth Amendment, unless the state courts had denied him a "full and fair" opportunity to litigate this claim. 428 U.S., at 494. The Court made clear that its "decision [did] not mean that the federal court lacks jurisdiction over such a claim".[7] *Id.*, at

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[7] *Stone*, of course, could not have announced a jurisdictional rule because Congress, which establishes the jurisdiction of the inferior federal courts, has expressly provided that the federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see id.* § 2241(b).

(Continued on following page)

495 n.37. Instead, *Stone* was predicated upon a conclusion that the *Mapp* exclusionary rule was not a "personal constitutional right" intended "to redress the injury" to the person affected ("for 'any [r]eparation comes too late' "), but rather was " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' " *Id.*, at 486 (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), and *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Finding that the additional deterrent effect, "if any," of applying this exclusionary rule on collateral review was "minimal" and that the societal costs of the exclusionary rule were "substantial," 428 U.S., at 494-95, the Court concluded that "[i]n light of the nature and purpose of the Fourth Amendment exclusionary rule," "effectuation of the Fourth Amendment . . . [does not] require the granting of habeas corpus relief" when the rule is violated. *Id.*, at 481, 480. In other words, the judicially created deterrent remedy does not include resort to federal courts on habeas corpus, because on collateral review the "remedy" is ineffectual.

In deciding *Stone*, this Court "carefully limited the reach of its opinion." *Rose v. Mitchell*, 443 U.S. 545, 560 (1979). It expressly cautioned that its decision was "*not* concerned with the scope of the habeas corpus statute . . . generally," *Stone, supra*, at 495 n.37 (emphasis in original), but rather solely with a "judicially created" rule that was of "minimal utility . . . when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding." *Id.* The Court was careful to emphasize that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment

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The alternative arguments of both petitioner (Br. 92) and *amici* California *et al.* (Br. 8) that Miranda claims are not covered by § 2254(a) because *Miranda* is not a statute, but "judge-made" law, are frivolous. Even if *Miranda* claims *could* be analogized to Fourth Amendment suppression claims – a contention we address below – *Stone* itself demonstrates that jurisdiction exists to adjudicate such claims. If it did not, this Court could not have held that claims under *Mapp* could be adjudicated in federal habeas corpus proceedings where the prisoner did not have a "full and fair" hearing in the state courts. Similarly, in *Duckworth v. Eagan*, 492 U.S. 195, 201 n.3 (1989), this Court could not have declined Justice O'Connor's invitation to decide the question presented in this case if it were jurisdictional.



rights." *Id.*, at 479. When Justice Brennan expressed fear in his dissent that *Stone* might portend "substantial evisceration of federal habeas corpus jurisdiction," *id.*, at 503, the majority dismissed as "misdirected" the "hyperbole of the dissenting opinion," insisting that the opinion was based upon considerations unique to the Fourth Amendment exclusionary rule. *Id.*, at 49 n.37.

Since *Stone* was decided, this Court has declined every invitation to extend its reach beyond its Fourth Amendment origins. *See Jackson v. Virginia*, 443 U.S. 307 (1979) (claims of insufficiency of the evidence under *In re Winship*, 397 U.S. 358 (1970)); *Rose v. Mitchell*, 443 U.S. 545 (1979) (claims of racial discrimination in grand jury proceedings); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (claims of Sixth Amendment ineffective assistance of counsel).[8] And this Court has continued to adjudicate allegations of state-court *Miranda* violations in proceedings brought under 28 U.S.C. § 2254. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Wyrick v. Fields*, 459 U.S. 42 (1982).

### B. None of the Considerations That Justified *Stone's* Limitation of the Remedy Encompassed by the Fourth Amendment Exclusionary Rule Warrants Barring *Miranda* Claims From Federal Habeas Corpus.

Three rationales justified the decision in *Stone:* first, that the *Mapp* exclusionary rule did not prevent or remedy the underlying constitutional violation; second, that violations of the Fourth Amendment do not affect the fairness or reliability of the trial; and third, that the marginal benefit, "if any," of extending the *Mapp* remedy to federal habeas proceedings was far outweighed by the burden collateral federal adjudication of those claims imposed upon the federal courts and federal-state comity. None of these rationales supports extending *Stone* to claims arising under *Miranda.*

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[8] *See also Brewer v. Williams*, 430 U.S. 387 (1977) (implicitly declining to apply *Stone* to Sixth Amendment claim); *Miller v. Fenton*, 474 U.S. 104 (1985) (implicitly declining to extend *Stone* to inquiries into the voluntariness of confessions); *Cardwell v. Taylor*, 461 U.S. 571 (1983) (*dicta* to same effect).

### 1. Unlike *Mapp, Miranda* Does Not Merely Deter Police Misconduct: It Actually Does "'Redress the Injury' to the Person Affected."

It is precisely because *Miranda's* exclusionary rule, unlike the exclusionary rule announced in *Mapp, does* prevent defendants' constitutional rights from being violated, that the considerations which underlie this Court's decision in *Stone* do not favor eliminating habeas review of *Miranda* claims.

The Fourth Amendment protects a right to privacy – the right of an individual to be free from unreasonable searches and seizures. *See Boyd v. United States,* 116 U.S. 616, 630 (1886); *Mapp v. Ohio, supra,* at 646-47; *Stone v. Powell, supra,* at 482. This right, fundamental as it is, is not necessarily connected with a criminal trial. A person subjected to an unreasonable search and seizure often is not charged with any crime; if he is, he may never be tried. Yet his constitutional rights have been violated. Indeed, even if a trial does subsequently take place, nothing that occurs during that trial can alter the Fourth Amendment violation in any way. The Fourth Amendment violation is complete at the time of the invasion of privacy. There is no additional invasion of privacy wrought by admission of the illegally-seized evidence.

For this reason, suppression of materials seized in violation of the Fourth Amendment cannot serve to cure the prior invasion of privacy or any other right protected by the Fourth Amendment. Suppression may serve other purposes – principally, deterrence against future unreasonable searches and seizures by police against other persons. But because suppression of evidence cannot undo an invasion of privacy, it cannot be justified on remedial grounds, for as this Court has pointed out, "[r]eparation comes too late." *Linkletter v. Walker,* 381 U.S. 618, 637 (1965) (quoted in *Stone, supra,* at 486). This is the meaning of *Stone's* teaching that *Mapp* did not establish a "personal constitutional right," but rather simply a measure aimed at general deterrence of future police misconduct. As Justice Powell, the author of *Stone,* later explained in *Kimmelman v. Morrison, supra,* 477 U.S., at 392 (concurring opinion): "[W]e reasoned in *Stone* that the exclusionary rule



does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel."

*Miranda* is utterly different. The Self-Incrimination Clause of the Fifth Amendment protects a defendant from being compelled in a criminal trial to be a witness against himself. It provides a defendant an absolute constitutional right to refuse to incriminate himself at trial with his own words and to bar the government from introducing in its case-in-chief any statement made under custodial police interrogation which was not "truly the product of his free will."

The Self-Incrimination Clause, in other words, provides a *trial* right. Even where the police extract statements from a suspect in custody without administering *Miranda* warnings, and even where the stationhouse statements are prompted by force or palpable coercion, there is no violation of the Self-Incrimination Clause unless and until the statements are admitted at trial as part of the prosecution's case-in-chief. The constitutional provision that "[n]o person shall be compelled in any criminal case to be a witness against himself" does not protect an individual from being "compelled" to speak or testify prior to trial – only from the subsequent introduction of such statements as evidence of guilt at trial. *See, e.g., Kastigar v. United States,* 406 U.S. 441 (1972); *Murphy v. Waterfront Commission,* 378 U.S. 52, 100, 107 (1964) (White, J., concurring). It is not simply the gathering, but the *use* of the evidence that violates the Self-Incrimination Clause.

Thus, in stark contrast to a Fourth Amendment violation, which occurs whether or not a prosecution ever ensues and which cannot be remedied by suppression at trial, a violation of the Self-Incrimination Clause can be completely prevented by suppression of stationhouse statements taken in violation of *Miranda.* The link between the remedy (exclusion of evidence at trial) and the constitutional violation is not simply *stronger* in the *Miranda* context than in the context of the Fourth Amendment exclusionary rule: in the Self-Incrimination context, the remedy actually *prevents* the constitutional violation. That is why it can properly be said that the Self-

Incrimination Clause itself contains an exclusionary rule. *See Duckworth v. Eagan, supra*, 492 U.S., at 209 (O'Connor, J., concurring) ("The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.").

To be sure, suppression of custodial statements taken in violation of *Miranda* may also serve purposes of general deterrence. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974).[9] The constitutional imperative of *Miranda*, however, is not deterrence. It is the *prevention* of a violation of the defendant's own constitutional right at his trial. That is the critical, and huge, difference between *Miranda* and *Mapp*.

### 2. Unlike the Fourth Amendment Exclusionary Rule, *Miranda* Rights Are Fundamentally Linked to Considerations of Fairness and Reliability at Trial.

The Court in *Stone* was also persuaded to exclude *Mapp* claims from federal habeas corpus because *Mapp* caused the exclusion of highly reliable evidence. Quoting Justice Black's dissent in *Kaufman v. United States*, 394 U.S. 217, 237 (1969), the Court found that evidence seized in violation of the Fourth Amendment "can in no way have been rendered untrustworthy by the means of its seizure." *Stone, supra*, at 490. Application of *Mapp* therefore "deflects the truthfinding process" and "afford[s]" a "windfall [to] guilty defendant[s]." *Id.*, at 490.

Unlike physical evidence seized in violation of the Fourth Amendment, however, a custodial statement taken from a suspect in violation of *Miranda* is presumptively

[9] In addition, *Miranda* "provided police with concrete guidelines, promoting self-regulation and reasonably ensuring the admissibility of confessions when its dictates are followed. *Miranda* also gave lower courts easily applicable rules and obviated in many instances the case-by-case analysis previously utilized to resolve challenges to confessions." *White v. Finkbeiner*, 687 F.2d 885, 893 n.21 (7th Cir. 1982), *vacated on other grounds*, 465 U.S. 1075 (1984). In contrast, "[n]o such benefits accompanied *Mapp*, which contained only a remedial component and did nothing to clarify the general prohibition against unreasonable searches and seizures." *Id.*



*un*reliable. When *Miranda* violations are raised in federal habeas corpus proceedings, "the integrity of the factfinding process" of the state trial court is called into question. *Brewer v. Williams*, 430 U.S. 387, 414 (1977) (Powell, J., concurring). *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 240, 241 (1973) (stating that the "basis of [*Miranda*] was the need to protect the fairness of the trial itself" and that there is a "vast difference" between rights under the Fourth Amendment and rights, like those expressed in *Miranda*, that "protect a fair criminal trial"); *White v. Finkbeiner, supra*, 687 F.2d at 894 ("*Miranda* claims cannot fairly be characterized as entirely non-guilt-related."). Indeed, this Court has recognized that the unreliability of statements obtained in violation of *Miranda* is an important justification for the decision in that case. In *Johnson v. New Jersey*, the Court noted that "*Miranda* guard[s] against the possibility of *unreliable statements* in every instance of in-custody interrogation. . . . *Miranda* provide[s] important new safeguards against the use of *unreliable statements* at trial." 384 U.S., at 730 (emphasis added).[10]

[10] Similarly, the Court has noted that " 'a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be *less reliable* and more subject to abuses' than a system relying on independent investigation"; thus, "protection of the courts from reliance on untrustworthy evidence" is an important justification for the Fifth Amendment exclusionary rule. *Michigan v. Tucker, supra*, 417 U.S. at 448 & n.23 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (emphasis added)).

None of this Court's decisions delimiting the scope of *Miranda* undermine this tie between *Miranda* and reliability. In *Oregon v. Hass*, 420 U.S. 714 (1975), which permitted use of statements obtained in violation of *Miranda* to impeach a testifying defendant, the Court made clear that it was doing so to ensure that *Miranda* would not be used to frustrate, rather than to achieve, its own aims of reliability. *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Michigan v. Tucker*, 417 U.S. 433 (1974), held simply that the Constitution does not require the exclusion of reliable evidence obtained after *Miranda* warnings were given, provided it was not obtained involuntarily; thus, those cases serve to reinforce the notion that reliability is a foundation underlying *Miranda*. The Court's focus on the importance of *Miranda* warnings to insure reliability is confirmed by its consistent refusal to allow the unwarned confessions in *any* of these cases to be admitted into evidence as direct evidence of guilt. Indeed, with the exception of *New York v. Quarles*, 467 U.S. 649 (1984), which established a *sui generis* "public safety" exception, this Court has never upheld the admission, as direct evidence of guilt, of a custodial statement obtained in the complete absence of *Miranda* warnings.

In fact, *Miranda* arose as a direct effort to introduce trustworthiness into a process that had long been decried as burdensome and unreliable. Before *Miranda*, trial courts excluded statements made to the police when they found the statements to be involuntary, *see, e.g., Chambers v. Florida*, 309 U.S. 227 (1940) – a determination that often required vexing and time-consuming *ad hoc* inquiries into the facts of each case. Because typically only the suspect and the police officers were present in the interrogation room, *see Miranda, supra*, at 445, the resulting hearings often degenerated into credibility contests in which the suspects alleged coercion and the officers denied it. Trial courts had difficulty making reliable factual determinations and thus determining the voluntariness of the statement. *See, e.g.*, Note, *Developments in the Law – Confessions*, 79 Harv. L. Rev. 935, 983-84 (1966); Y. Kamisar, *Police Interrogation and Confessions* 73-75 (1980); Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 871 (1981). In this context, the bright-line *Miranda* rules, with their specified warnings, waiver requirements, and allocation of the burdens of proof, improved the ability of courts to make reliable, constitutionally significant judgments regarding the admissibility of testimonial evidence.

Thus, whereas in the name of protecting privacy interests unrelated to the criminal process, *Mapp* concedely frustrates the pursuit of truth by depriving the trial court of tangible, reliable evidence of the defendant's factual guilt, *see Stone v. Powell, supra*, at 490, the exclusion of statements under *Miranda* – because they are presumptively *in*voluntary and *un*reliable – enhances the system's ability to arrive at the truth through trustworthy and fair means.

This is especially true when, as in the case at bar, the alleged violation is no mere "technical" violation of *Miranda*, in which the challenge is directed to the precise phrasing of the *Miranda* warnings. *Cf. Duckworth v. Eagan, supra; Michigan v. Tucker, supra*. The officers interrogating Robert Williams administered *no Miranda* warnings whatsoever. They took no steps at all to ascertain that his self-incriminatory statements reflected a knowing and voluntary waiver of his right to remain silent and his right to counsel. They were fully



aware of their failure to do so and continued in their unwarned interrogation even after discussing it between themselves. During the course of his interrogation on April 10th, Williams was persistently exhorted to alter and expand upon his prior statements by admonitions that he was still not telling the truth and that he could only avoid being charged if the officers believed him. This is precisely the type of situation in which the reliability concerns articulated in *Miranda* are particularly acute. It is far indeed from the Fourth Amendment claims at issue in *Stone*, in which clearly reliable physical evidence was excluded to protect interests unrelated to the criminal process.[11]

### 3. Eliminating *Miranda* Claims from Federal Habeas Corpus Would Neither Decrease the Burden on Federal Courts Nor Ameliorate Federal-State Friction.

In *Stone*, this Court envisioned utilitarian benefits from the exclusion of *Mapp* claims from federal habeas scrutiny:

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[11] The important difference between *Miranda* and *Mapp* in this regard is well illustrated by comparing the facts in *Stone* with those in this case. *Stone* involved two cases: in one, the evidence to be excluded was obtained as a result of an arrest pursuant to a statute that was later determined to be unconstitutionally vague (*see* 428 U.S., at 471); in the other, the evidence was obtained with a warrant that was later declared to be invalid under *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964) (*see* 428 U.S., at 473). These technical violations are a far cry from the officers' studied decision in this case not to provide Robert Williams with *Miranda* warnings even after telling him in a stationhouse interrogation that he could either tell the truth or be locked up.

In any event, this Court has demonstrated that the effect of a constitutional violation on guilt or innocence in a particular case is not dispositive of requests to extend *Stone*. In *Rose v. Mitchell, supra*, for example, the court refused to extend *Stone* to alleged violations of the Equal Protection Clause in the selection of a grand jury foreman, even when the defendant had subsequently been convicted by a properly selected jury and the reliability of the guilt determination was not challenged. Similarly, in *Kimmelman v. Morrison, supra*, the Court refused to extend *Stone* to Sixth Amendment ineffective assistance claims, although the Court clearly believed the evidence admitted at trial had been reliable and probative. Even though the particular ineffectiveness claim in *Kimmelman* did not call into question the reliability of the defendant's conviction, members of the Court recognized that others might. *See, e.g.*, 477 U.S., at 393 (Powell, J., concurring).

> (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

*Stone, supra,* at 491 n.31 (quoting *Schneckloth v. Bustamonte, supra,* 412 U.S., at 259 (Powell, J. concurring)). The importance of limiting the burdens on federal courts and minimizing friction with state courts is underscored in virtually all of this Court's recent decisions limiting the scope of federal habeas review of claims by state prisoners. *See, e.g., Keeney v. Tamayo-Reyes,* 60 U.S.L.W. 4339, 4341 (U.S., May 4, 1992); *McCleskey v. Zant,* 111 S. Ct. 1454, 1469 (1991); *Coleman v. Thompson,* 111 S. Ct. 2546, 2559 (1991). Extension of the rule in *Stone* to *Miranda* claims, however, would very likely *increase* both the burdens on federal courts and the friction that attends federalism.

By removing claims under *Mapp* from federal habeas corpus, *Stone* effectively freed federal-court dockets from all collateral claims concerning the admission of physical evidence. Only egregious practices can support a due process claim concerning the production of physical evidence, *see, e.g., Rochin v. California,* 342 U.S. 165 (1952), and petitions raising these claims are both rare and easily screened.

Removing *Miranda* violations as a basis for federal habeas relief is likely to produce the opposite result. If *Miranda* claims are not considered, prisoners will seek to vindicate their rights by claiming, without reference to *Miranda,* that the statements admitted against them were compelled or involuntary and thus directly violative of the Fifth and/or Fourteenth Amendments. Unless this Court is prepared to reverse *Miller v. Fenton, supra,* and the entire jurisprudence upon which it is based – a course the Court expressly declined in *Wright v. West,* 60 U.S.L.W. 4369 (U.S., June 19, 1992) – claims raised by state prisoners in federal habeas petitions alleging that a statement introduced at trial had been compelled or induced involuntarily will be adjudicated in federal court, and under a *de novo* standard of "independent federal determination."



*See Miller v. Fenton, supra,* 474 U.S., at 110; *Wright v. West, supra,* 60 U.S.L.W., at 4644 (O'Connor, J., concurring), 4647 (Kennedy, J., concurring). Moreover, involuntariness must be determined by reference to the "totality of the circumstances" – a test that requires federal courts to inquire into the circumstances of the interrogation and to examine the precautions taken to avoid compulsion. *See Arizona v. Fulminante,* 111 S. Ct. 1246, 1252 (1991); *cf. Schneckloth v. Bustamonte, supra,* 412 U.S., at 227.

The replacement of *Miranda* claims – which typically are adjudicated easily under "bright-line" rules, *see, e.g., California v. Prysock,* 453 U.S. 355, 359 (1981) – with "direct" Fifth or Fourteenth Amendment claims that a confession was obtained involuntarily or absent a knowing and voluntary waiver of a suspect's rights will almost certainly increase the burden on federal courts and the friction between the federal and state courts. Not only do determinations of "voluntariness" and knowing and voluntary waivers – which must be adjudicated *de novo* in light of the "totality of the circumstances" – require considerably more time and effort than application of *Miranda,* but the very *nature* of these inquiries requires federal courts to scrutinize the entire record relating to the interrogation in question, and under a standard which is inherently ambiguous. Even ardent critics of *Miranda* have characterized the voluntariness standard as "a test which ma[kes] everything relevant and nothing determinative." Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 Nw. U.L. Rev. 100, 108-09 (1985) (citations omitted). The shift of focus from *Miranda* to direct Fifth or Fourteenth Amendment claims will almost certainly tend to impede reliance on state court findings of fact, *see, e.g., Taylor v. Cardwell,* 579 F.2d 1380, 1382 (9th Cir. 1978), by requiring resort to a standard of law that is necessarily more subjective and *ad hoc* than application of a bright-line standard, *see, e.g., Minnick v. Mississippi,* 111 S. Ct. 486, 489-91 (1990).[12]

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[12] *See also, e.g., Haley v. Ohio,* 332 U.S. 596, 602 (1948) (opinion of Frankfurter, J.) (describing the criteria of Due Process voluntariness as "[s]ubtle

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As a practical matter, extension of *Stone* to *Miranda* claims would not even remove *Miranda* issues from most cases: a federal court considering Fifth and Fourteenth Amendment claims in a habeas petition still would have to determine whether the petitioner had been warned of his rights, because such warnings are an important factor in analysis of the totality of the circumstances and bear directly on whether a defendant knowingly and voluntarily waived his rights.[13] *See Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); Note, *supra*, 79 Harv. L. Rev., at 981 n.219.

### C. That *Miranda* Announced "Prophylactic Rules" Necessary to Protect the Fifth Amendment Provides No Justification for Removing *Miranda* Claims From Federal Habeas Corpus.

The remaining assertion made by the warden and her *amici* relies *ipso facto* on the observation that *Miranda*

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and even elusive"); *Reck v. Pate*, 367 U.S. 433, 455 (1961) (Clark, J., dissenting) (describing the "elusive measureless standard of psychological coercion"); *New York v. Quarles*, *supra*, 467 U.S., at 663-64 (O'Connor, J., concurring in part and dissenting in part) (noting that one of the "core virtue[s]" of *Miranda* is its clarity for courts); Monaghan, *The Supreme Court, 1974 Term Foreword – Constitutional Common Law*, 89 Harv. L. Rev. 1, 22 & n.114 (1975) ("That the *Miranda* prophylactic rule approach is 'better' than the burdensome task of normal case-by-case adjudication may be conceded.").

[13] *See* Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 891 (1981). As Professor Schulhofer also points out (*id.*, at n.119):

> Moreover, if warnings were not given, or given and not respected, a habeas court applying a voluntariness analysis normally would even have to decide whether there was "custody" and "interrogation" *within the meaning of Miranda*, because the failure of the police to respect legal requirements is again recognized as an important factor in the totality of the circumstances. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 510 n.7 (1963); *Spano v. New York*, 360 U.S. 315, 320-21 (1959).



announced a "prophylactic rule." As the warden and the Solicitor General would have it, merely because *Miranda* announced a "prophylactic rule" (Pet. Br. 91), which is a "judicially fashioned mechanism designed 'to create institutional respect for Fifth Amendment values' " (U.S. Br. 14), therefore *Stone* dictates that federal courts should abstain from enforcing it. This assertion, however, fundamentally misconceives the holdings in both *Miranda* and *Stone*. *Miranda* is not simply a case about "mechanisms" and "institutional respect"; *Stone* did not decide anything at all about "prophylactic rules"; and the very test advocated by the warden's *amici* for adjudication of confession-related claims in federal habeas proceedings – the due process "voluntariness" test – *itself* incorporates prophylactic rules. Were this Court to announce a doctrine that "prophylactic" constitutional rules will not be enforced in federal habeas proceedings, federal courts would be required to revisit and reinterpret large bodies of constitutional doctrine, with an anomalous and unjustifiable result: separate federal and state standards for the enforcement of federal constitutional rights.

#### 1. *Miranda's* Prophylactic Rules Are Bound to Its Core Constitutional Holdings.

It is now common to regard *Miranda v. Arizona* as having announced "prophylactic rules." But what, precisely, does this mean? *Miranda* is unquestionably a landmark case about constitutional rights under the Self-Incrimination Clause of the Fifth Amendment. In *Miranda*, this Court held for the first time that the Self-Incrimination Clause was applicable to custodial police interrogations and that statements elicited by custodial interrogation might be inadmissible under that clause even if they could not be deemed "revolting to the sense of justice," *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).[14] The privilege against compelled self-incrimination,

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[14] *See Michigan v. Tucker*, *supra*, 417 U.S. at 443 ("Thus the Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause

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*Miranda* held, "is fulfilled only when the person [in custody] is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." 384 U.S., at 460 (citation omitted).

*Miranda* further held that custodial surroundings are inherently fraught with compulsion, and therefore "protective devices" are necessary to ensure that any custodial statements given in the absence of counsel are truly made upon free will. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings," the Court held, "no statement obtained from a defendant can truly be the product of his free choice." *Id.*, at 458. The Court went on to discuss *what* protective devices would suffice to "appris[e] accused persons of their right of silence and . . . assur[e] a continuous opportunity to exercise it," *id.*, at 467, leaving the actual choice of procedures to legislatures and police agencies. Finally, the Court held, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475.

Over time, *Miranda* has come to be understood as having announced both core requirements of the Fifth Amendment privilege against compelled self-incrimination and certain "prophylactic rules" necessary to guarantee the privilege itself. On the "core" side, *Miranda* plainly holds that a suspect in police custody has a Fifth Amendment right to remain silent and a correlative right to exclude as direct evidence of guilt any statement made by him during custodial interrogation, unless the statement was the result of a *knowing and voluntary* waiver of his right to remain silent at the stationhouse. *See, e.g., Michigan v. Tucker, supra*, 417 U.S., at 443.

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was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles."); *Michigan v. Mosley*, 423 U.S. 96, 100 (1975).



On the "prophylactic" side, it is clear that the precise warnings specified in *Miranda* are not a " 'constitutional straitjacket' " but rather "provide practical reinforcement for the right against compulsory self-incrimination." *Michigan v. Tucker, supra*, at 444 (quoting *Miranda*). Indeed, *Miranda* itself stated expressly that the Constitution does not mandate any "specific code of procedures" for protecting the Fifth Amendment privilege against compelled self-incrimination. The Court indicated that procedures other than the warnings set forth in its opinion would satisfy the constitutional mandate so long as they are "fully as effective" as the Court's own. *Miranda, supra*, at 490.

The intermediate holding of *Miranda* – that because police custody is an inherently coercive setting, "adequate procedural devices" are required before any custodial statement can be considered the "product of free choice" – is not readily categorized as either "core" or "prophylactic." On the one hand, *Miranda* itself held that in the absence of "fully effective" alternative safeguards, "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." 384 U.S., at 476. Three years later, this Court reaffirmed that "use of [custodial] admissions obtained in the absence of the required warnings [is] a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Orozco v. Texas*, 394 U.S. 324, 326 (1969). And as Justice O'Connor has explained: *Miranda* "held *unconstitutional*, because inherently compelled, the admission of statements derived from incustody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it." *New York v. Quarles, supra*, 467 U.S., at 660 (concurring in part and dissenting in part) (emphasis added). *See generally* Monaghan, *supra*, 89 Harv. L. Rev., at 42 n.217 (1975) ("*Miranda* thus holds that 'adequate' safeguards are constitutionally required.").

On the other hand, the requirement of "adequate protective devices" is based upon a *presumption* that custodial

interrogations are inherently coercive. Because in some instances a suspect's unwarned custodial statements may, in fact, "truly be the product of his free choice," 384 U.S., at 458, it can be said that *Miranda* "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), and announces a prophylactic rule. That, presumably, is the meaning of the observation in *Elstad, supra*, at 307 n.1, that "[a] *Miranda* violation does not *constitute* coercion but rather affords a bright-line legal presumption of coercion, requiring suppression of all unwarned statements."

Prophylaxis or not, *Miranda*'s exclusion of unwarned custodial statements is intimately tied to the privilege against compelled self-incrimination. As the Court reaffirmed in *Moran v. Burbine*, 475 U.S. 412, 420 (1986):

> In *Miranda v. Arizona*, the Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S., at 467.

Similarly, in *Miller v. Fenton*, the Court recognized the special need for independent federal review of claims involving the taking of a confession. Although *Miller v. Fenton* was limited on its facts to a due process challenge (since the defendant in that case – unlike Robert Williams – had been advised of his *Miranda* rights as soon as he was brought to the police station), the Court's analysis applies with equal force in the context of *Miranda* claims (474 U.S., at 117-18):

> [T]he critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment. *Miranda v. Arizona*, 384 U.S., at 458. These circumstances . . . elevate the risk that erroneous resolution of the voluntariness question might inadvertently frustrate the protection of the federal right. . . . We note . . . that in the confession context, independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defendant's own admissions.



It bears emphasizing that *Miranda*'s prophylactic rules are based squarely on the principles that "[t]his Court has always set high standards of proof for the waiver of constitutional rights" and that because "the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given (and of the waiver of Fifth Amendment rights) during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda, supra*, 384 U.S. at 475.

### 2. *Stone* Provides No Justification for Excluding Violations of Prophylactic Rules Like Those Announced in *Miranda*.

Wherever the line between "core" rights and prophylaxis is drawn, the fact that *Miranda* announces prophylactic rules to protect the Fifth Amendment does *not* supply a reason to subject *Miranda* claims to the rule in *Stone*. In fact, a habeas exception for prophylactic rules was not even an issue in *Stone*, because the Fourth Amendment doctrine announced in *Mapp v. Ohio, supra*, does not apply a prophylactic rule.

A prophylactic rule is one designed to prevent a current constitutional violation (or other violation of law) from occurring. Such rules, which are pervasive in constitutional jurisprudence,[15] frequently take the form of conclusive presumptions and are based upon two premises: first, that "application of [the] presumption . . . reach[es] the correct result most of the time," *Coleman v. Thompson*, 111 S. Ct. 2546, 2548 (1991); and second, that uncertainties and difficulties in proof make it difficult to separate violations from nonviolations, *see, e.g., Miranda, supra*, at 448. Failure to create a

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[15] Examples of prophylactic rules imbedded in constitutional jurisprudence even outside of criminal procedure are discussed in, *e.g.*, Monaghan, *supra*, 89 Harv. L. Rev., at 18-26; Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 448-49 (1987).

bright-line presumption would therefore result in constitutional violations in an unacceptable number of cases.

By requiring suppression of custodial statements made in the absence of warnings or other "adequate protective devices," *Miranda* announces such a prophylactic rule. *Mapp v. Ohio*, however, does not. The Fourth Amendment exclusionary rule cannot possibly – and does not even purport to – prevent any violation of the defendant's Fourth Amendment rights from occurring, for in every instance the violation has already occurred.[16] Instead, the exclusionary rule announced in *Mapp* provides only a forward-looking deterrent remedy designed to " 'exert general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers' " in the future. *Stone v. Powell, supra*, at 465 n.24 (quoting Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 388-89 (1964)). Thus, any argument based upon the "prophylactic" nature of *Mapp* is unconvincing and misleading.

Indeed, ironically, the very standard to which the warden's *amici* would have federal courts return – whether a confession was ufficiently "voluntary" to satisfy due process – itself incorporates prophylactic rules. This Court has held, for example, that the infliction of unexplained physical brutality on a suspect in police custody renders any subsequent statement *per se* involuntary. *See, e.g., Sims v. Georgia*, 389 U.S. 404 (1967); *Stein v. New York*, 346 U.S. 156, 182 (1953) (opinion by Jackson, J.) (When "[p]hysical violence or [the] threat of it" is "present, there is no need to weigh or measure its affects on the will of the individual victim."); *Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (Frankfurter, J., concurring) ("It is, I assume, common ground that if this record had disclosed . . . one truncheon blow on the head of petitioner a confession following such a blow would be inadmissible because of the Due Process Clause."). In *Miller v. Fenton*, Justice O'Connor reflected the "consistently held view" that even under the Fourteenth Amendment "voluntariness" standard, "the admissibility of a confession turns as much on

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[16] *See* discussion *supra* pp. 18-19.



whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." 474 U.S., at 116 (emphasis in original).[17]

If there is any basis for applying *Stone* to *Miranda* claims, then, it is *not* because *Miranda* includes prophylactic rules. Indeed, so long as a prophylactic rule protecting a constitutional right is valid, a person convicted in violation of that rule is plainly in custody in violation of either the "Constitution" or the "laws" of the United States. *See* 28 U.S.C. § 2254(a). Were this not the case, the dozens, perhaps hundreds, of cases in which this Court has applied constitutional prophylactic rules to the states were wrongly decided.

It is therefore highly questionable whether federal courts even have the power to decline claims raised by state prisoners on habeas corpus that they are in custody in violation of a prophylactic rule that, according to this Court, is mandated by the Constitution. Even if such power exists, however, this Court should carefully consider the mischievous consequences of adopting the suggestion that *Miranda* should not be enforced in federal habeas corpus proceedings (except in the rare instance in which the petitioner was denied a "full and fair" hearing in the state court) on the ground, *ipso facto*, that *Miranda* applies prophylactic rules.

If *Stone* were applied to all "prophylactic rules" – rules which, like *Miranda*, respond to "the context of the criminal processes maintained by the American States" (*Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)) by establishing conclusive presumptions or altering burdens of persuasion in the fact-finding process necessary for the enforcement of federal constitutional rights – then this Court and the lower federal courts would be required to revisit not only the entire body

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[17] Moreover, the warden's argument based on the prophylactic nature of *Miranda* overlooks the fact that this Court has already declined to extend *Stone* to the admittedly "prophylactic" rule at issue in *Brewer v. Williams*, 430 U.S. 387 (1977).

of doctrine developed to adjudicate the voluntariness of confessions, but indeed much of federal constitutional doctrine in order to disentangle what is "prophylactic" from what is "nonprophylactic."

Such a rule would require courts to decide, for example, whether the burdens placed on the State when a suspect is physically abused in custody (*Sims v. Georgia, supra*) or is subjected to mind-altering drugs (*Beecher v. Alabama*, 408 U.S. 234 (1979); *Riggins v. Nevada*, 112 S. Ct. 1810 (1992)) are "necessary" constitutional cures or only "prophylaxes." Similarly, courts would be required to reexamine whether the burdens shifted by the "prima facie" evidence rules of, *e.g.*, *Avery v. Georgia*, 345 U.S. 559 (1953), *Castenada v. Partida*, 430 U.S. 482 (1977), and *Batson v. Kentucky*, 476 U.S. 79 (1986); or the rules preventing violations of the Confrontation Clause announced in *Bruton v. United States*, 391 U.S. 123 (1968), and *Cruz v. New York*, 481 U.S. 186 (1987); or the procedures for competency determinations (and the proscriptions against retroactive determinations) of *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975); or the rules to prevent violations of the due process proscription of vindictive sentencing or prosecution stated in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Blackledge v. Perry*, 417 U.S. 21 (1974), are "core" constitutional mandates or prophylaxes to prevent constitutional violations.

That analysis would be a burdensome and convoluted route to an irrational result: two bodies of doctrine governing many federal constitutional rights, one for application by state courts and another for application by federal habeas corpus courts. Such a result would also directly undermine a principal function of federal habeas corpus – to ensure that state courts faithfully follow extant federal constitutional rules, *see, e.g., Teague v. Lane, supra*, 489 U.S., at 306-07.[18]

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[18] The crucial incentive federal habeas corpus creates for state courts to adhere faithfully to uniform federal standards has been stressed even by those members of this Court most concerned about the costs of collateral federal review. As Justice Powell stated, concurring in *Solem v. Stumes*, 465 U.S. 638, 653

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### D. No Other Basis Exists to Decline Review of *Miranda* Claims Brought under 28 U.S.C. § 2254.

The sole question Warden Withrow presented to this Court with respect to the *Miranda* rulings of the lower courts is whether *Stone v. Powell* should be extended to bar collateral review. Nonetheless, she has devoted over seventy pages of her brief to an exegesis on the supposed "History of the Writ," dating from the thirteenth century, apparently in support of her contention that this Court's perversion of the writ of habeas corpus "has transformed the writ into a juridical Frankenstein monster, which is threatening to turn upon the Society which created it" (Pet. Br. 83). To the extent the warden contends that federal courts may, and should, decline to consider *Miranda* claims raised under 28 U.S.C. § 2254(a) for reasons other than those stated in *Stone v. Powell*, the question has neither properly been presented to this Court nor accepted by it for review.

In any event, the warden's historical claims are easily answered. Congress, which alone demarks the habeas jurisdiction of the federal courts, has provided unequivocally that federal courts "*shall* entertain" an application for a writ of habeas corpus by a state prisoner "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see also id.* § 2241(b)(3). Whether *Miranda* announced "core" requirements of the Fifth Amendment privilege against compelled self-incrimination or "prophylactic" rules designed to protect that privilege, its holding is nonetheless federal law,

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(1984), the function of "[r]eview on habeas [is] to determine that the conviction rests upon correct application of the law in effect at the time of the conviction." *See also, e.g., Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting); *Penry v. Lynaugh*, 492 U.S. 302, 352 (1989) (Scalia, J., concurring in part, dissenting in part); *Butler v. McKellar*, 494 U.S. 407, 413 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

and this Court has never arrogated for itself the right to decline claims properly presented under § 2254(a) that a state prisoner is in custody in violation of the "Constitution or laws" of the United States. As noted *supra*, at pp. 15-17, this Court went out of its way in *Stone* to disavow any such interpretation of its decision. The habeas doctrines implemented by this Court to minimize federal-state friction – *see, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977) (state procedural default); *Ex parte Royall*, 117 U.S. 241 (1886) (exhaustion of state remedies); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) (abuse of the writ) – have all been limited to instances in which habeas petitioners sought relief on claims that had not been preserved and presented in a timely and proper fashion. Indeed, in each of these decisions the Court was careful to emphasize the enduring scope of the writ.[19]

## II. There Is No Basis For Reversing the Sixth Circuit's Holding That Respondent Was Entitled To Habeas Corpus Relief Because Involuntary Statements Were Used at Trial As Evidence of Guilt.

All four of the federal judges who have considered this case concluded that the post-warning statements used by the State to prove Robert Williams' guilt at trial were "involuntary" under the "totality of the circumstances" and hence

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[19] *See, e.g., Ex parte Royall, supra*, 117 U.S., at 247 ("The grant . . . of jurisdiction to issue writs of *habeas corpus* is in language as broad as could well be employed."); *Wainwright v. Sykes*, supra, 433 U.S., at 79, 87 (reaffirming in the context of a *Miranda* claim raised in habeas corpus the holding of *Brown v. Allen* "that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas"); *McCleskey v. Zant, supra*, 111 S. Ct., at 1462 (also reaffirming *Brown*).

To the extent the Court may find the historical development of habeas corpus relevant, respondent respectfully refers the Court to the briefs *amici curiae* filed in *Wright v. West, supra*, on behalf of the American Bar Association, Professor Mishkin, *et al.*, and Attorney General Civiletti, *et al.* Should the Court wish to direct argument on these issues, which are outside the scope of the questions presented here, respondent requests an opportunity to submit a supplemental brief applying the points cited in those briefs to the claims at issue in this case.



inadmissible under the rationale of *Oregon v. Elstad*, 470 U.S. 298 (1985), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The warden seeks to assail this unanimous conclusion in three ways, but in each she manifestly fails to carry her burden. *First*, the warden contends that Fifth Amendment voluntariness claims (as well as all other constitutional claims) should be excluded from federal habeas jurisdiction when the petitioner has had an opportunity to raise them in state court – an argument that was raised neither in the certiorari petition nor in the court below, and that is therefore not properly before the Court. *Second*, she contends that the voluntariness issue was not exhausted – an argument that she expressly disclaimed in the court below, and thus also should not be considered by the Court. *Third*, she asserts that the Sixth Circuit's voluntariness analysis was so novel as to violate the principle of *Teague v. Lane*, 489 U.S. 288 (1989) – an argument refuted simply by reading the opinions below, which are based on the application of well-entrenched principles of law. The warden's failure to show adequate and cognizable grounds for reversing the Sixth Circuit's holding on voluntariness requires affirmance by the Court.

### A. Petitioner's Argument That All Fifth Amendment Claims (and, Indeed, All Constitutional Claims) Should Be Conditionally Excluded From Federal Habeas Corpus Is Not Properly Before the Court.

The petition for certiorari in this case presented three questions. The first and third related to Mr. Williams' claim of voluntariness, and placed before the Court the issues of whether the voluntariness claim had been exhausted in the state courts (question 1), and, if it had, whether the Sixth Circuit had applied an incorrect standard or "new rule" in resolving the merits of that claim (question 3). Only the second question raised any issue as to the exclusion of claims from the scope of federal habeas corpus based upon full and fair opportunity to assert them in state court. That question read as follows:

> [W]here the premise of the Fifth Amendment ruling is a finding of a *Miranda* violation and where the petitioner has had one full and fair opportunity to raise the *Miranda* claim in state court, should collateral review of the same claim on a habeas corpus petition be precluded?

The question plainly frames the issue whether the rationale of *Stone v. Powell* should be applied to *Miranda* claims.[20] Nonetheless, in her brief on the merits, the warden spends only five pages of argument on whether *Stone* should be applied to *Miranda* claims, and devotes the entire balance of her brief (with the exception of two footnotes addressed below) to an argument that *Brown v. Allen*, 344 U.S. 443 (1953), should be overruled, and federal habeas petitioners precluded from asserting *any* Fifth Amendment claim that they were afforded a full and fair opportunity to litigate in the state courts. Moreover, the warden announces, "if this Court extends the rule in *Stone* to include all Fifth Amendment claims, *it could do so only by extending it to include all claimed violations of the Constitution.*" Pet. Br. 97-98 n.67 (emphasis added). Thus, having induced the grant of certiorari by inviting this Court to consider the application of *Stone v. Powell* to *Miranda* claims, the warden now seeks a ruling that habeas review of *any* constitutional claim should be completely foreclosed if the habeas petitioner had a full and fair opportunity to raise the claim in state court.

Beyond being meritless,[21] the question briefed by the warden plainly is not fairly comprised in the question

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[20] Indeed, as rephrased in her brief on the merits, the second question presented is exclusively limited to whether *Stone v. Powell* bars collateral review. *See* Pet. Br. at i.

[21] Even the Solicitor General recognizes that there is no basis for extending the principles of *Stone v. Powell* to voluntariness claims (let alone to *all* constitutional claims, as the petitioner advocates). *See* U.S. Br. 17 ("It is, of course, still open to a state prisoner to claim on habeas corpus that his statements were in fact involuntary under the Fifth Amendment itself, as opposed to . . . being admitted in contravention of *Miranda*'s . . . rules.").



presented in the petition for certiorari, and thus is not properly before the Court. As this Court's Rule 14.1(a) makes clear, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) further emphasizes that "the brief may not raise additional questions or change the substance of the questions already presented in [the petition for certiorari]." Ironically, the Court emphasized in *Stone v. Powell* itself that "only in the most exceptional cases will we consider issues not raised in the petition." 428 U.S., at 481 n.15. *See, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1532-33 (1992).

These words have particular resonance here, for just last Term, in *Wright v. West, supra*, the Court was asked to consider, *inter alia*, whether *Brown v. Allen*, 344 U.S. 443 (1953), should be overruled and replaced by a principle of deference by federal habeas courts to state-court resolution of federal constitutional questions. Despite the briefing and argument of this issue – which involved detailed attention in the briefs of both the parties and the many *amici curiae* to the same historical questions addressed by the warden's brief in this case – the majority of this Court either rejected or declined to consider the argument that *Brown v. Allen* should be overruled. *See Wright v. West, supra*, at 4644 (White, J., concurring in the judgment); *id.*, (O'Connor, J., concurring in the judgment); 4647 (Kennedy, J., concurring in the judgment); 4648 n.1 (Souter, J., concurring in the judgment). Even the three justices who appeared receptive to a rule of deference to state courts stopped far short of adopting Warden Withrow's broad argument that habeas review of *any* federal constitutional claim should be foreclosed altogether when there has been an opportunity to present the claim in state court. *See id.*, at 4643-44 (opinion of Thomas, J.).

The warden's extravagant arguments have, in any event, been waived. She never argued below that all constitutional claims (or even all Fifth Amendment claims) should be excluded from federal habeas corpus when there has been an opportunity to raise them in state court. Indeed, she specifically told the Sixth Circuit that the principles of *Stone*

should *not* be extended to Fifth Amendment voluntariness claims (Br. App. 15 (emphasis added)):

> Respondent [*i.e.*, petitioner Withrow] discerns a difference between a Fourth Amendment claim, raising a question of the reasonableness of a search and a Fifth Amendment claim, raising the question of the voluntariness of a confession: the former involve[s] evidential questions reflecting a policy decision to deter unlawful police conduct by suppressing evidence of a third-party's criminality; the latter cut[s] to the heart of the determination of guilt or innocence, calling into question the accuracy of the accused's own admission of guilt. *Accordingly, respondent perceives no legitimate basis for applying the rule in Stone v. Powell to cases involving the voluntariness of a confession.*

Thus, not only did the warden's petition for certiorari fail to raise the question she now argues, and not only did she fail to raise it in the court below; she actually argued *precisely the opposite* in the Sixth Circuit. Under these circumstances, the Court should express its "disapprov[al of] the practice of smuggling additional questions into a case after we grant certiorari," *Irvine v. California*, 347 U.S. 128, 129 (1954). Here, as in *Jones v. Hildebrant*, 432 U.S. 183, 188 (1977), it has become clear that the questions presented in the petition for certiorari were "only the tip of the iceberg." Instead of arguing the questions she herself presented to the Court, Warden Withrow has chosen to devote virtually all of her brief to a far broader question that was never raised in the courts below and that is obviously meritless under any of the views of the law expressed in the various opinions in *Wright v. West, supra*. As in *Jones v. Hildebrant*, the consequence of petitioner's game of bait-and-switch should be dismissal.

### B. The State Expressly Waived the Argument That Robert Williams Failed To Exhaust His Voluntariness Claim.

Warden Withrow's cavalier approach to the questions on which this Court granted certiorari is further exemplified by



her "argument" on the first question presented – namely, whether Robert Williams exhausted his claim that involuntary statements were used against him at trial. That "argument" consists of a single citation incorporating by reference a three-paragraph footnote earlier in the brief. The footnote, in turn, addresses the exhaustion point only through rote citations to *Anderson v. Harless*, 459 U.S. 4 (1982), and *Picard v. Connor*, 404 U.S. 270 (1971), and fails to mention, let alone address, the basis of the Sixth Circuit's ruling on the exhaustion issue – namely, that in argument before the Court of Appeals the State expressly disclaimed any reliance on the contention that Mr. Williams' claims had not been exhausted. The Sixth Circuit concluded that "[a]t oral argument, the government conceded that this [exhaustion] position was without merit" (Pet. App. 13a, n.1).

The warden's answer to the Sixth Circuit's conclusion is only hinted at in her brief, but she apparently argues that she conceded exhaustion only of Mr. Williams' *Miranda* claim, and not of his voluntariness claim. *See* Pet. Br. 13. But this argument cannot be squared with the record, which makes clear that she never presented in a timely manner the claim she now advances.

In the District Court, the warden did not raise any exhaustion issue at all. In her Court of Appeals brief, by contrast, the warden argued that *none* of Mr. Williams' claims was exhausted, because, in her view, Mr. Williams "never raised *any* Federal issue at all relating to his confession in the State appellate courts – and, in point of fact, specifically limited his claim on appeal to State Constitutional law." App. Br. 5-6 (emphasis added; footnote omitted). Nowhere in her brief did the warden suggest that the exhaustion issues as to *Miranda* and voluntariness might be different.[22]

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[22] With respect to voluntariness, the warden did raise the separate claim that the issue had not been raised in the habeas petition; however, she presents no argument in her brief before this Court as to why this alleged defect in Mr. Williams' *pro se* draftsmanship should result in reversal of the lower courts' findings as to voluntariness. In effect, the District Court granted an amendment of

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At oral argument before the Sixth Circuit, counsel for the State devoted his entire allotted time to arguing the merits of the voluntariness issue and the question whether Mr. Williams had been in custody for purposes of his *Miranda* rights. When the Court directed counsel's attention to the exhaustion question, the following exchange occurred (Tape of Oral Argument, at counter 393-413 (emphasis added)):

> THE COURT:
>
> Just quickly, Mr. Caminsky, what about this exhaustion argument? Frankly, I thought the custody issue is so obvious a resolution that I thought we were going to hear you talk for 14 minutes about the exhaustion issue.
>
> MR. CAMINSKY:
>
> Well, I believe –
>
> THE COURT:
>
> So talk for two minutes, would you please?
>
> MR. CAMINSKY:
>
> Okay. *In terms of the exhaustion issues* it seems to me that the defendant in this case, in the state court appeal, appeared to have sought to try to get the state courts to adopt the focus test rather than the custody test. That seems to have been the basis of the entire state court appeal and in large measure I think that that may very well prevent them from granting the relief that he seeks. *I think that I probably did not really raise that sufficiently in the district court so I have a feeling that this court, if it chooses, could tend to overlook that.* In addition, upon rereading the defendant's brief, it seems to me that the defense attorney appears

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the petition to comport with the facts before her, *see* Fed. R. Civ. P. 15(b), and the warden cannot show any prejudice resulting therefrom, given her full and fair opportunity to litigate the voluntariness issue in the courts below.



> to have attempted to categorize it not as a state issue or as a *Miranda* test but as a *Miranda-Ziegler* test, I think that is what she called it. *So, I don't really think that if it is going to turn on exhaustion, I don't really feel comfortable arguing that too forcefully –*
>
> THE COURT:
>
> Thank you.
>
> MR. CAMINSKY:
>
> *– which is just one of the reasons I haven't chosen to do that.*

At no point in his argument did counsel for the State suggest to the Court of Appeals that his concession on the exhaustion issue was in any way limited to Mr. Williams' *Miranda* claims, and since no such distinction was hinted at in the warden's brief, the Sixth Circuit was quite justified in taking at face value the concession that the exhaustion argument was meritless and accepting the warden's invitation to rule on Mr. Williams' claims. Only when the Sixth Circuit ruled adversely on the merits did the warden argue for the first time in her petition for rehearing that, while the *Miranda* issue was exhausted, the voluntariness issue was not.

Under such circumstances, consideration by this Court of the exhaustion issue is plainly inappropriate. It is firmly established that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). *Accord, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This rule applies with equal if not greater force where a litigant has expressly conceded a point in the lower courts, for "[h]aving conceded this point in both courts below, [such a litigant] will not be heard to dispute it here." *Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988). Nor does the warden's belated attempt to raise the exhaustion point as to the voluntariness claim in her petition for rehearing salvage it for her, for this Court has long recognized that the untimely raising of an issue only in a

rehearing petition in the court of appeals "precludes our consideration." *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *cf. Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

Consideration of the exhaustion question is also inappropriate under substantive principles of exhaustion law. In *Granberry v. Greer*, 481 U.S. 129 (1987), this Court recognized that exhaustion is not a jurisdictional prerequisite to habeas review, and thus a State may waive the defense of nonexhaustion by failing to raise it in a timely fashion. *Granberry* addressed the situation in which a State, whether deliberately or inadvertently, failed to contest exhaustion in the district court, and then sought to rely on the defense of nonexhaustion on appeal. While declining to hold that such a default would in all cases constitute a waiver, the Court cautioned that it would be "unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary." *Id.*, at 132.

Here, unlike in *Granberry*, the State's disavowal of the exhaustion defense in the court below was not inadvertent, but express and deliberate. Permitting the State belatedly to raise the exhaustion issue after inviting the Court of Appeals to ignore it would send precisely the wrong message to litigants in habeas proceedings, providing them with an incentive to sandbag in the Court of Appeals by holding out the prospect that this Court will bail them out if they miscalculate. Under such circumstances, the "interests of comity and federalism" that govern the issue of waiver of exhaustion, *id.*, at 134, counsel precisely the same result as this Court's own longstanding policy of not addressing points not pressed below: the exhaustion issue should not be addressed here.

### C. The Lower Courts' Ruling on Voluntariness Correctly Applied Settled Principles of Law and Is in No Way Contrary to *Teague v. Lane*.

The warden's final attack on the lower courts' voluntariness ruling is an argument that those courts applied a *per se*



rule that "a confession which follows *Miranda* warnings [is] involuntary merely because police indicate the possibility of lenient treatment if an accused tells them the truth." Pet. Br. i (third question presented). While the warden argues that this supposed *per se* rule constitutes a new rule of law that may not be applied in habeas proceedings under the principles of *Teague v. Lane, supra*, and *Sawyer v. Smith*, 497 U.S. 227 (1990), there is no reason to address that argument since neither court below applied any such rule.

Once again, the warden's argument on this question is astonishingly cursory, consisting only of a sentence incorporating by reference a footnote notable primarily for its lack of analysis.[23] The Solicitor General devotes somewhat more argument to the issue, asserting that the lower courts incorrectly adopted a *per se* rule derived from *Bram v. United States*, 168 U.S. 532, 542-43 (1897). *See* U.S. Br. 18-20. But the arguments of both the warden and the Solicitor General fundamentally mischaracterize the lower courts' rulings, for even a brief review of the opinions below shows that far from applying a novel *per se* rule that any inducements invalidate a confession, the courts simply applied familiar and long-settled principles of law.

Thus, the District Court explicitly noted that the voluntariness inquiry depends upon the totality of the circumstances analysis set forth in such cases as *Miller v. Fenton, supra, Oregon v. Elstad, supra, Schneckloth v. Bustamonte, supra*, and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The court further recognized that *Bram v. United States, supra*, has "not been applied to establish a *per se* rule." Pet. App.

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[23] The state's primary argument that the lower courts applied a "new rule" is the assertion that the decision below is inconsistent with three, apparently randomly selected, decisions. One of the cases cited, *United States v. Mast*, 735 F.2d 745 (2d Cir. 1984), is easily distinguishable in that it did not involve the coercive setting of custodial interrogation. In the other two, *Commonwealth v. Saya*, 17 Mass. App. 921, 456 N.E.2d 764 (1983), *rev. denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1984), and *People v. Pinkham*, 139 Ill. App. 3d 554, 487 N.E.2d 707 (1985), the courts specifically found that no promises of leniency had been made.

69a.[24] Indeed, the District Court did not rely directly on *Bram* itself, but rather on Justice White's opinion for the Court in *Brady v. United States*, 397 U.S. 742 (1970), which emphasized that *Bram* retains its vitality not as a *per se* rule, but rather as an example of a set of circumstances (improper inducements in the course of an uncounselled custodial interrogation) in which a confession *may* be held involuntary. *See* Pet. App. 58a-59a, 64a-65a.[25] Consistent with this approach, the District Court pointed to a number of factors (Pet. App. 64a, 70a-71a) – including the custodial setting of the interrogation, the absence of counsel, the serious and accusatory tone of the interrogation, and the repeated promises that Williams would "walk" if he talked (but otherwise would be locked up) to support its finding that, under the totality of the circumstances, Robert Williams' post-warning statements on April 10, 1985, were involuntary.

Similarly, the Sixth Circuit applied no novel *per se* rule, but instead correctly noted that the voluntariness inquiry required it to " 'examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of the statements.' " Pet. App. 9a (quoting *Oregon v. Elstad, supra*, 470 U.S., at 318). Applying this "totality of the circumstances" analysis, the Court of Appeals affirmed the District Court's ruling that in light of

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[24] Ironically, the District Court also cited and relied upon two of the very cases endorsed by the Solicitor General, *United States v. Long*, 852 F.2d 975 (7th Cir. 1988), and *United States v. Guerrero*, 847 F.2d 1363 (9th Cir. 1988), for the proposition that inducements to confess do not render a confession involuntary *per se*, but improper inducements are among the factors to be considered in an analysis of involuntariness.

[25] The Court's opinion in *Arizona v. Fulminante* confirms the appropriateness of this form of reliance on *Bram*. In *Fulminante*, the Court noted that in light of such cases as *Schneckloth v. Bustamonte*, *Bram* "does not state the standard for determining the voluntariness of a confession" if viewed as stating a *per se* rule against "any direct or implied promises, however slight." 111 S. Ct., at 1251. However, the Court endorsed an analysis that treated *Bram* as setting forth considerations that, in the proper case, may be viewed in the context of the totality of the circumstances as rendering a confession involuntary. *See id.* (citing with approval *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986)).



the overall context of Mr. Williams' custodial interrogation and the "promises of leniency coupled with threats of immediate imprisonment," Mr. Williams' post-warning inculpatory statements were "coerced in violation of the fifth amendment." Pet. App. 19a.

There is nothing at all novel in this analysis. The "totality of the circumstances" analysis applied by both the Sixth Circuit and the District Court has repeatedly been reaffirmed by this Court, most recently in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). Nor is there anything out of the ordinary in the lower courts' holding that improper promises of leniency – and particularly promises that are illusory, Pet. App. 18a[26] – are important and sometimes decisive factors in the voluntariness analysis. *See Lynumn v. Illinois*, 372 U.S. 528 (1963). Indeed, both state and federal appellate courts uniformly hold that such promises of leniency may, depending upon all the circumstances, invalidate a confession.[27] While the results in

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[26] As the District Court noted, it was quite unlikely, given the evidence the police already had, that Mr. Williams would "walk" if he talked, as promised by the interrogating officers. Pet. App. 71a.

[27] A good example is the Arizona case cited approvingly in *Fulminante*, *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986) (en banc), in which the Arizona Supreme Court reversed a lower court finding of voluntariness by focusing on the undisputed testimony of the defendant that a deputy had told him that a confession would have a beneficial effect on his sentence, and on the fact that it "was only after the deputy 'explained' the alternatives that defendant made the incriminating admissions." 714 P.2d, at 397. In an opinion cited by this Court as "accurately describ[ing] the State's burden of proof for establishing voluntariness," *Fulminante, supra*, 111 S. Ct., at 1251, the Arizona Supreme Court held that "the deputy's actions in obtaining the confession amounted to the 'exertion of any improper influence' and were therefore impermissible." 714 P.2d, at 397. Federal court decisions applying the same test used by the court below to examine the voluntariness of custodial statements made following alleged promises of leniency include: *Green v. Scully*, 850 F.2d 894 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988); *Miller v. Fenton*, 796 F.2d 598, 609-10 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986) (following remand); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Shears*, 762 F.2d 397, 403 (4th Cir. 1985); *Hawkins v. Lynaugh*, 844 F.2d 1132, 1139-40 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988); *United States v. Long*, 852 F.2d 975 (7th Cir. 1988); *Woods v. Armontrout*, 787

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particular cases may vary depending upon both the facts found as to the existence and nature of any promises of leniency and the other surrounding circumstances, there is no basic disagreement over the underlying principles that apply.

It is altogether bizarre to suggest that this is a case in which the lower courts either needed to, or did, resort to a *per se* rule "that the Fifth Amendment barred use of any confession obtained by 'any direct or implied promises, however slight.' " U.S. Br. 18 (quoting *Bram*). Robert Williams' interrogation involved far more than "promises," and those promises it did involve were far from "implied" and very far from "slight." Williams was first told that he was facing two life sentences on the basis of facts the police could prove. Next, he was told he could either give his interrogators what they deemed to be "the truth" or they would "simply" lock him up. Next, he was promised he would "walk" if he confessed to playing the precise accessorial role for which he was subsequently prosecuted, convicted, and given two life sentences. The promises which induced his confession – which were repeated throughout the successive interrogation sessions on April 10th – were tantamount to promises of non-prosecution (*cf. New Jersey v. Portash*, 440 U.S. 450 (1979)) and were not only subsequently dishonored (*cf. Santobello v. New York*, 404 U.S. 257 (1971)), but dishonest or utterly reckless at the time they were made (*see* note 26 *supra*). This was flagrant police misconduct when judged against the "long held" principle that "tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."

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F.2d 310 (8th Cir. 1986); *United States v. Garot*, 801 F.2d 1241 (10th Cir. 1986); *United States v. Pinto*, 671 F. Supp. 41, 59 (D. Me. 1987). Other state court decisions include: *Womack v. State*, 281 Ala. 499, 205 So. 2d 579 (1967); *Turner v. State*, 48 S E.2d 522, 203 Ga. 770 (1948); *State v. Burr*, 126 Ariz. 338, 615 P.2d 635 (1980) (en banc); *People v. DeJesus*, 63 App. Div. 2d 148, 407 N.Y.S.2d 5 (1st Dep't 1978), *appeal dismissed*, 48 N.Y.2d 734, 422 N.Y.S.2d 379 (1979); *People v. Kyczek*, 307 Ill. 150, 138 N.E. 275 (1923); *Commonwealth v. Meehan*, 377 Mass. 552, 387 N.E.2d 527 (1979), *cert. dismissed*, 445 U.S. 39 (1980).



*Miller v. Fenton, supra*, 474 U.S., at 109-10. And there is nothing "new" about the lower courts' holdings that heavy-handed disregard of a suspect's rights is particularly likely to induce a confession. *See Brown v. Illinois*, 422 U.S. 590, 604-05 (1975); *Oregon v. Elstad, supra*, 470 U.S., at 312.

Thus, this is not a case in which a novel rule has been applied, or even one in which an established rule has been applied in a novel way. Rather, it is a case in which the established rule is inherently fact-specific, such that each unique set of facts requires an individually tailored outcome. The application of such a rule may in many cases be close or debatable. But where such a rule is at issue, it is not enough simply to seize upon a single outcome and assert that it constitutes application of a "new rule." As Justice Kennedy has written: "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Wright v. West, supra*, 60 U.S.L.W., at 4647 (concurring opinion). Like the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), which was at issue in *Wright v. West*, the voluntariness test under this Court's decisions "[b]y its very terms . . . provides a general standard which calls for some examination of the facts." 60 U.S.L.W., at 4647. "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.*[28]

The warden and her supporting *amici* have manifestly failed to establish that the application of settled principles by the courts below is somehow so far out of keeping with other applications of the same principles as to constitute a "new rule." Indeed, a *Teague*

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[28] *Accord, id.*, at 4646 (O'Connor, J., concurring); *id*, at 4649 (Souter, J., concurring); *see also Stringer v. Black*, 112 S. Ct. 1130 (1992) (holding that application of established Eighth Amendment principles to capital sentencing scheme did not "break new ground" and was therefore not a "new rule" under *Teague*).

issue can only be manufactured in this case by grossly mischaracterizing the opinions below as following a *per se* rule that is nowhere expressed or implied in either of them. Accordingly, the Warden has supplied no basis for overturning the lower courts' voluntariness ruling.[29]

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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[29] The Solicitor General's brief also seems to invite the Court to review the lower courts' application of the "totality of the circumstances" voluntariness test. However, the question of the correctness of the Sixth Circuit's application of settled principles of law was not presented by the petition for certiorari, which, on the merits of the voluntariness issue, raised only the question whether the lower court had applied a novel *per se* test, and whether application of that test violated *Teague*. Since that question must be answered in the negative, there is no occasion for proceeding to review the lower courts' fact-specific analysis – a task that in any event is not a suitable use of this Court's limited time and resources. *See Hayes v. Florida*, 470 U.S. 811, 814-15 n.1 (1985); *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984).